



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 30, 2003

Ms. Rebecca L. Payne  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2003-3661

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181922.

The Texas Department of Human Services (the "department") received a request for five categories of information relating to the department's Special Nutrition Program offices in Dallas/Fort Worth and Houston. You have provided documentation showing that the department sent a letter to the requestor on March 19, 2003 requesting clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). The department received a response from the requestor dated March 20. You advise that you are releasing some of the requested information, and are withholding some of the requested information pending a determination on this information in relation to a previous request for a decision. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.114, 552.117, and 552.136 of the Government Code, and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code. You also claim that some information may be confidential under section 552.110, and you have provided documentation showing that you have notified an interested third party, YMCA of Metropolitan Dallas ("YMCA"), whose proprietary interests may be implicated by the request, of the request for information. *See* Gov't Code § 552.305 (permitting interested

third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). We have considered the exceptions you claim and have reviewed the submitted information.

We first note that section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As you acknowledge, you did not submit comments stating why the claimed exceptions apply or a copy of the information requested or representative samples within the fifteen day period prescribed by section 552.301. Under section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Because the exceptions you claim provide compelling reasons to overcome the presumption of openness, we will address your arguments.

Further, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, YMCA has not submitted to this office its reasons explaining why its information should not be released. Therefore, YMCA has provided us no basis to conclude that its information is excepted from disclosure under section 552.110. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, YMCA's information must be released.

We next note that you inform us that some of the information at issue is the same information that was at issue in a previous request for a ruling from the department to this office. The current request seeks some of the identical information previously requested and ruled upon by this office in Open Records Letter No. 2003-2668 (2003). We have no indication that the facts or circumstances on which that ruling was based have changed. Assuming this is the case, we conclude that you must rely on that ruling as a previous determination and withhold the information that we ruled was excepted from disclosure under section 552.103 in accordance with Open Records Letter No. 2003-2668. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We now turn to your claims in relation to the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that sections 12.003 and 21.012 of the Human Resources Code make confidential the requested information in its entirety. Section 12.003 of the Human Resources Code provides:

- (a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003 (Emphasis added.) In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977). You state that in this instance, release of the submitted client information would not be for purposes directly connected with the administration of the department's assistance programs. Therefore, this information is confidential under sections 12.003 and 21.012 of the Human Resources Code, and the

documents containing this information must be withheld from disclosure in their entirety under section 552.101 of the Government Code. Because all of the submitted client information is confidential under these provisions, we need not address your claim under federal law for this information.

You further claim that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We find that none of the information at issue here consists of criminal history information compiled by a governmental entity. Thus, the common-law privacy concerns expressed in *Reporters Committee* do not apply to make any information confidential in this instance.

You also contend that some of the submitted information is excepted from disclosure under sections 552.026 and 552.114 of the Government Code and FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. See Open Records Decision No. 390 at 3 (1983). We note that the department is not an "educational agency or institution" for purposes of the relevant provisions. See Gov't Code § 552.026 (incorporating FERPA, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g into Public Information Act); Open Records Decision No. 539 (1990) (noting that this office applies same analysis under FERPA and section 552.114); see also 20 U.S.C. 1232g(a)(3) (defining "educational agency or institution" as public or private agency receiving federal funds "under any applicable program"). However, we believe the information you have highlighted that relates to students attending Paul Quinn College constitutes education records under FERPA while maintained by the educational agency. Thus, if the department received the information at issue under the written consent of the students, this information must be withheld from the requestor under FERPA. See *id.* § 1232g(a)(3), (b)(4)(B), (b)(7)(d). However, if the department obtained the information in some other manner than from the educational agency under the written consent of the students, the information may not be withheld under FERPA.

You also contend that the social security numbers of department employees contained in the submitted information are excepted under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You indicate that all of the employees whose information is at issue elected pursuant to section 552.024 to keep their information confidential. Therefore, if these employees made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made, we agree that the department must withhold their social security numbers under section 552.117.

With regard to the social security numbers of department employees, if any, who did not make a timely election under section 552.024, and with regard to any remaining social security numbers contained within the submitted information, this information may nevertheless be confidential. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained and are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you contend that some of the submitted information is excepted under section 552.136 of the Government Code. This section provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We agree that you must withhold the account information you have marked pursuant to section 552.136.

In summary, you must rely on our ruling in Open Records Letter No. 2003-2668 as a previous determination in withholding the information that we ruled is excepted from disclosure in that decision. You must withhold information pertaining to the department's clients under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resources Code. The information pertaining to students that you have highlighted may only be withheld under FERPA if the information was obtained pursuant to the consent of the students. You must withhold the social security numbers of department employees who have made a timely section 552.024 election under section 552.117. Any remaining social security numbers contained in the submitted information may be confidential under section 552.101 in conjunction with the federal Social Security Act. You must withhold the information you have marked pursuant to section 552.136. The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", written in a cursive style.

Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 181922

Enc. Submitted documents

c: Ms. Jan Chang  
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(w/o enclosures)